

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of MANSFIELD/TAYLOR, Minors.

UNPUBLISHED

April 15, 2014

No. 318057

Bay Circuit Court

Family Division

LC No. 12-011090-NA

Before: HOEKSTRA, P.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

Following a one-day hearing, the circuit court terminated respondent-father's parental rights to his then two-year-old son, AT, based on four statutory grounds under MCL 712A.19b(3). In rendering its decision, the court improperly relied upon hearsay evidence regarding AT's special needs and that respondent had physically abused AT's older half-siblings. The court properly considered direct evidence regarding respondent's past abuse of the children's mother, along with respondent's recent initiation of anger management and domestic violence counseling. The circuit court did not clearly err in determining that respondent would not be able to provide proper care and custody and a safe home environment within a reasonable time given the child's age. Therefore, despite the court's evidentiary errors, we affirm.

I. BACKGROUND

Respondent and the child's mother, AM, met in 2010 and started dating. AM testified that their relationship was unhealthy from the beginning, with respondent stalking and physically abusing her. AM became pregnant and after AT's birth, respondent and AM rented an apartment. The pair lived with their infant son and AM's two young children from her previous marriage. Respondent admits that during their relationship, he physically abused AM. He pleaded guilty or no contest to domestic violence charges on two separate occasions. Respondent also concedes that he abused alcohol and marijuana and that he was hostile and violent when he was intoxicated. While respondent agrees that he was not a good parent and never took care of AT's needs, he denies that he physically abused the other children.

In January 2012, Child Protective Services (CPS) warned AM that she needed to suspend contact with respondent due to the number of domestic violence reports between them. Her failure to comply would result in the initiation of child protective proceedings, the agency advised. On March 2, 2012, the school that AM's oldest child attended reported suspected abuse and the children were taken into care. The three were placed together in a foster home. Respondent incorrectly believed that he had numerous felony warrants against him and went into

hiding. (Respondent actually faced only one domestic violence charge.) On March 29, 2012, AM pleaded no contest to the allegations in the Department of Human Services (DHS) petition and the court exerted jurisdiction over the children. Over the next several months, AM participated in services toward reunification. Respondent, on the other hand, continued to abuse alcohol and marijuana. He rotated between living in a tent in the woods and living with AM in violation of a no-contact order. On at least two reported occasions, respondent physically assaulted AM. AM later revealed other injuries perpetrated by respondent. During this time, respondent had absolutely no contact with the DHS.

Respondent was arrested on September 7, 2012, and appeared for his first hearing in this matter on October 8. Respondent indicated that he was facing jail time, and he actually remained incarcerated until July 7, 2013. The DHS recommended various services for respondent that he could not begin until his release. While incarcerated, however, respondent attended AA meetings and participated in substance abuse counseling.

On January 7, 2013, the DHS reported to the court that young AT had started exhibiting new health concerns. The toddler had allegedly always been averse to physical contact with others. More recently, the child began throwing tantrums and holding his breath until he aspirated, resulting in seizures. The DHS worker stated that the child would begin sensory therapy in an effort to resolve these issues.

Respondent was released from jail on July 7, 2013, and appeared for a review hearing the following day. At that hearing, the DHS filed a petition to terminate the parental rights of respondent and AM, as well as the father of the older two children. Respondent indicated his intent to fight the termination petition and start services toward reunification. Respondent had less than a month to act, as the termination hearing was scheduled for August 2. The court ordered supervised parenting time and respondent visited the child on four occasions. Respondent was wearing a tether that monitored his sweat secretions for alcohol content. This device showed that respondent remained sober. Respondent participated in random drug screening and his results were negative. He continued substance abuse counseling and his counselor began basic domestic violence and anger management treatment. However, respondent admitted that the treatment with his substance abuse counselor would not qualify to meet the requirements of his parole and he was scheduled to begin more intensive anger management therapy. Respondent filled out the paperwork to begin a psychological evaluation, but the testing had yet to be done. Respondent also began parenting classes and had completed six sessions before the termination hearing. Respondent worked odd jobs and was living with his mother in a two-bedroom apartment.

On July 31, AM agreed to relinquish her parental rights to her children, conditioned on the court's termination of the fathers' rights. Petitioner presented minimal evidence at the termination hearing. AM testified about the abuse she had suffered at respondent's hands, as well as his substance abuse history. AM claimed that her older children told her about instances of abuse, however, she implied that she never actually witnessed any abuse. The instructor of respondent's parenting class testified that respondent was actively participating, but that assessments had yet to be conducted to determine respondent's level of progress. AT's foster father testified that the toddler has an attachment disorder. He also provided further details about the child's tantrum-induced seizure disorder. The foster father indicated that he was attending

sensory therapy with AT, but they had only just begun sessions. The foster father further claimed that respondent's parenting time sessions had been disruptive to the child, and one visit had to be cut short due to AT's level of distress. The caseworker also testified about AT's special needs and indicated that the child had entered therapy. Notably, the petitioner presented no testimony or report from AT's therapist or pediatrician. Respondent also testified at the hearing. He admitted his past problems with violence and substance abuse, acknowledged that he caused the delay in receiving services by absconding from authorities, and described the active steps he had taken during his incarceration and following his release to work toward reunification with his son.

The circuit court thereafter terminated respondent's parental rights. This appeal followed.

II. LEGAL PRINCIPLES

Pursuant to MCL 712A.19b(3), a trial court "may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence" that at least one statutory ground has been proven. The petitioner bears the burden of proving that ground. MCR 3.977(A)(3); *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). We review a circuit court's factual finding that a statutory termination ground has been established for clear error. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013) (quotation marks and citation omitted). "Clear error signifies a decision that strikes us as more than just maybe or probably wrong." *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009). Furthermore, the "clear and convincing standard is the most demanding standard applied in civil cases[.]" *Id.* (citations omitted).

Pursuant to MCL 712A.19b(5), "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." A circuit court must determine by a preponderance of the evidence that termination is in the child's best interest. *Moss*, 301 Mich App at 83.

Where the petitioner seeks termination of a parent's rights based on new or different circumstances than those leading to jurisdiction, the court's decision must be based on legally admissible evidence. MCR 3.977(F). Here, the circuit court relied in part on AT's special needs, needs that had not been discovered when jurisdiction was taken over the children. Therefore, the court was required to consider legally admissible evidence.

III. GROUNDS FOR TERMINATION

The circuit court relied on four separate grounds in terminating respondent's parental rights to AT. The court's findings, however, were based on inadmissible hearsay and an apparently unsupported mental health diagnosis of the young child. Despite these errors, we need not reverse the circuit court's ruling. Clear and convincing, admissible evidence did support at least one ground for termination.

A. FACTOR (b)(i)

MCL 712A.19b(3)(b)(i) provides for termination if the court finds:

The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

The circuit court concluded that termination was proper under this factor based on AM's testimony. AM testified about her belief that the children had been abused by respondent. This evidence was inadmissible hearsay, however, upon which the court could not rely. Termination under this factor was therefore erroneous.

At the termination hearing, AM testified that while she and respondent were living with her mother, respondent would yell at the children "but he wouldn't ever like hit them." Once the couple moved into their own apartment, however, "he'd get really rough with the kids, yell at 'em, sent 'em to the [sic] room." AM claimed that she "was afraid to tell him to leave," and so she "just *stopped really noticing* all the stuff that was happening." (Emphasis added.) Although AM described the details surrounding respondent's abuse of her, she provided no details about the alleged abuse of her children. On cross-examination by respondent's counsel, AM clarified: "Sometimes he hit 'em. Um my daughter had stated that he pulled out her hair. I believe my children. *I didn't see it*, but she was losing hair and it was unexplained why." (Emphasis added.) Respondent denied ever physically abusing AM's older two children.

AM's testimony about her children's claims of abuse was clearly hearsay. It was a statement made by declarants outside of the courtroom (the older children), it was admitted to prove the truth of the matter asserted, and the declarants were not available for questioning. See MRE 801(c). The statements were inadmissible pursuant to MRE 802. Absent admissible evidence that respondent had abused AT's siblings, the circuit court could not rely on this factor. Even more troubling is that the court found termination supported under this factor despite concluding, "It's not clear to the Court whether [respondent] actually abused these children." Thus, the court's findings and its determination under MCL 712A.19b(3)(b)(i) are incongruous and clearly erroneous.

B. FACTORS (c)(i), (g), AND (j)

We consider these factors together because the circuit court improperly relied on accounts of AT's "special needs" in reaching its determination. Underlying the analyses of these three factors was the circuit court's conclusion that AT is a "very special needs child" based on his inability to bond with others and his tantrum-induced seizures. The court determined that it would take a significant period of time for respondent to create a bond with AT because of the child's "detachment disorder" and that respondent did not possess the wherewithal to handle AT's seizure disorder. AT's "special needs" had yet to be discovered when the court took jurisdiction over the child. Accordingly, the court erred in supporting termination under factor (c)(i) with that information. Further, there is no indication that AT was ever diagnosed by a

professional with having a “detachment disorder.” Rather, this was a term introduced into the record by the foster father based on his own observations. The circuit court erred in supporting termination under factors (g) and (j) based on a lay person’s opinion about a toddler’s emotional disorder.

However, the petitioner did establish by clear and convincing evidence that respondent had a long history of substance abuse and violent behavior. Respondent also testified that he had previously been diagnosed with bipolar and impulse control disorders and yet was taking no medication to control his conditions. Respondent received no services to rectify these problems in the first seven months of the proceedings because he purposefully hid his whereabouts from caseworkers. Thereafter, respondent was incarcerated for approximately 10 months because of his violent behavior, rendering him unable to secure most necessary services. While respondent exhibited impressive drive in the month after his release from jail, the petitioner showed that it would take considerable time to establish that he could remain sober, avoid violent conduct, and stabilize his mental health. The circuit court could have supported termination under these three factors based on this evidence, regardless of any special needs of the child

Factor (c)(i) permits a court to terminate a parent’s rights under the following conditions:

The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child’s age.

As noted, AT’s “special needs” were not a condition that led to the adjudication. However, respondent’s history of domestic violence toward the child’s mother and substance abuse were. Respondent admitted this history at the termination hearing. To support termination under this factor, the petitioner needed to establish by clear and convincing evidence that these conditions continued to exist and could not be rectified within a reasonable time.

Termination can be supported under factor (g) when:

The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child’s age.

Further, under factor (j), termination is supportable when:

There is a reasonable likelihood, based on the conduct or capacity of the child’s parent, that the child will be harmed if he or she is returned to the home of the parent.

Under these factors, the circuit court considered that respondent had only recently begun services, such as counseling and parenting classes. Instead of focusing on the extended period

the child would have to wait while respondent's success was measured, however, the court focused on the child's "special needs" and respondent's inability to address them.

At the termination hearing, AT's foster father testified that AT did not like physical contact with any adults when he first came into care. The baby did not want to be held, rocked, or cuddled, even during feeding time. The baby would sob until he was given personal space. Based upon these symptoms, the foster father believed the child suffered from an attachment disorder. It appears from the record that no one ever diagnosed AT with this condition. According to the Mayo Clinic, "To be diagnosed with reactive attachment disorder, a baby or child must meet criteria spelled out in the Diagnostic and Statistical Manual of Mental Disorders (DSM). This manual is published by the American Psychiatric Association and is used by mental health providers to diagnose mental conditions." See *Reactive attachment disorder: Tests and diagnosis*, Mayo Clinic, <<http://www.mayoclinic.org/diseases-conditions/reactive-attachment-disorder/basics/tests-diagnosis/con-20032126>> (accessed March 27, 2014). The signs of attachment disorders can also resemble other conditions, such as autism and post-traumatic stress disorder. *Id.* Ultimately, the foster father was not an expert qualified to make such a diagnosis. While his observations would have been useful to a clinician treating the child, they could not form the basis of an expert opinion upon which the court could rely.

It appears from the record that a therapist had agreed to work with AT and the foster father. The foster father testified that he participated with AT in sensory therapy. The child had only attended a couple of sessions by the time of the termination hearing. The petitioner did not present the therapist to explain the child's condition, nor did it provide any medical reports. Absent an actual diagnosis, the circuit court clearly erred in focusing its decision on this evidence.

However, the petitioner did present clear and convincing evidence that respondent would not be able to rectify the conditions that led to adjudication—domestic violence, substance abuse, and untreated mental health issues—within a reasonable time so that he could provide proper care and custody and a safe home for his child. Respondent testified that he had been addicted to alcohol since the age of 13 and had only been sober since his incarceration. Respondent had remained sober for the first month after his release while he was attached to an electronic tether. As noted by the petitioner's witness, it would take significant time to ensure that respondent could remain sober. Respondent admitted that he became violent and hostile when intoxicated. And respondent continued to assault AM until his incarceration. Accordingly, if the child were returned to respondent's care before he adequately demonstrated his continued sobriety, the child could be placed in physical danger. Moreover, respondent testified that he suffered from bipolar and impulse control disorders and had not been on medication for over a year. By the time of the termination hearing, respondent had not yet resumed treatment. It would take significant time for respondent to show mental stability.

Given the short term of respondent's late-found desire to work toward reunification and the extended amount of time it would take to demonstrate true recovery, the petitioner provided clear and convincing evidence that respondent could not rectify the conditions that led to the adjudication or provide proper care and custody within a reasonable time given the child's age. The petitioner also established that AT faced a reasonable probability of harm if returned to respondent's care. As found by the court, "it would take [respondent] another year of intense

parenting time with the child, including intense services, to verify that he is no longer a risk to his children or . . . to the partners . . . that he may have during his lifetime.” Accordingly, although the circuit court focused too heavily on inadmissible hearsay, the court’s ultimate findings that termination was supported under MCL 712A.19b(3)(c)(i), (g), and (j) were not clearly erroneous.

IV. BEST INTERESTS

The circuit court also did not clearly err in finding that termination of respondent’s parental rights was in AT’s best interests. “In deciding whether termination is in the child’s best interests, the court may consider the child’s bond to the parent, the parent’s parenting ability, the child’s need for permanency, stability, and finality, and the advantages of a foster home over the parent’s home.” *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). “The trial court may also consider a parent’s history of domestic violence, the parent’s compliance with his or her case service plan, the parent’s visitation history with the child, the children’s well-being while in care, and the possibility of adoption.” *In re White*, ___ Mich App ___, ___ NW2d ___ (Docket No. 316749, issued January 16, 2014), slip op at 6.

Here, AT had no bond with respondent; the two had only reconnected one month before the termination hearing. Although the foster father was not qualified to diagnose the child with an attachment disorder, he could testify more generally about AT’s bonds with others. The foster father testified that respondent was appropriate during visits but that AT did not seem to connect with him. Respondent also had never actually parented AT. He admitted that he took no part in caring for the child while he was still in his custody. And respondent’s parenting class instructor testified that respondent had not been attending long enough to assess his parenting skills. Respondent compliance with his service plan was also new. He purposefully absented himself from these proceedings for seven months and was then incarcerated for assaulting the child’s mother. Moreover, AT had made significant improvement in his foster home and the family wished to adopt him and his siblings. “[I]n most cases it will be in the best interests of each child to keep brothers and sisters together[.]” *Olive/Metts*, 297 Mich App at 42 (quotation marks and citation omitted). The foster father and AM testified that the older siblings had a strong bond with their baby brother. Accordingly, the circuit court did not clearly err in finding that termination of respondent’s parental rights was in the best interests of the child.

We affirm.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Elizabeth L. Gleicher